IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 805

DULIEN STEEL PRODUCTS, INC., *Petitioner,*

v.

ELBERT B. CONNELL, *Respondent.*

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

I. JURISDICTION OF THIS COURT IS PROPERLY INVOKED

Respondent has challenged the jurisdiction of this Court to grant the writ of certiorari. That such challenge is without merit is readily apparent from the following brief discussion.

This Court's jurisdiction is invoked under 28 U.S.C. 1257 which states in pertinent part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .
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> * * *
>
> (3) By writ of certiorari . . . where any right . . . is specially set up or claimed under the . . . statutes of . . . the United States."

This action is brought pursuant to the Fair Labor Standards Act of 1938, as amended. (R. 4) Without said federal statute, respondent would have no basis for his action. He was not claiming a common law right nor a right based upon the laws of Louisiana. His only basis for a claim against petitioner was under a statute of the United States,—Sec. 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216 (b)).

Respondent's assertion that no federal statute is involved because a disputed question of fact was the primary issue below is without merit. Two "sleeping time" cases previously decided by this Court (*Armour & Co.* v. *Wantock,* 323 U.S. 126 (1944); *Skidmore* v. *Swift & Co.,* 323 U.S. 134 (1944), clearly belie this contention because jurisdiction in those cases, as here, was based on the matter in controversy arising under the laws of the United States (28 U.S.C. 1331). And cases such as *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697 (1944); *J. F. Fitzgerald Constr. Co.* v. *Pederson,* 324 U.S. 720 (1944) which were writs of certiorari to state courts, confirm this Court's jurisdiction.

As this Court said in an analogous situation in *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239, 245-246 (1942):

". . . in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under § 237(b) of the Judicial Code, 28 U.S.C. § 344(b)."

This Court's jurisdiction is clear.

Properly stated, respondent's opposition to the petition for a writ of certiorari is that this Court should not exercise its discretion in granting the writ because the question presented was not decided by the Trial Judge and was raised in the Supreme Court of Louisiana by motion to remand and recall the decree. No serious question is raised concerning the jurisdiction of the Supreme Court of Louisiana to consider the motion or that it did not consider it. The only authority cited for the state court's supposed lack of jurisdiction (*D'Apremont* v. *Peytavin,* 5 Mart. (O.S.) 641 (1818)) is so patently different from the instant case that it could not conceivably have deterred the court.

Unlike the *D'Apremont* case, of which full disposition had been made by the Louisiana Supreme Court more than six months prior to its consideration of defendant's motion to retax costs, the motion in the instant case was filed 10 days after the Supreme Court of Louisiana had acted, while the parties were still before the Court and before any attempt ever had been made to execute on the judgment. (*Louisiana Code of Practice,* Article 911) As a consequence, the cited case offers no precedent at all for denying the court's power to correct the judgment in the circumstances of the case at bar, where the motion was filed as soon as the unwitting error of counsel was discovered and

where the resulting judgment is what is tantamount to a penalty of more than ten times the additional compensation for which petitioner is legally indebted to respondent.

In any event, this contention is but one factor which this Court should consider in determining whether to exercise its certiorari jurisdiction. Other factors which are highly persuasive and should be decisive are that the judgment below is clearly contrary to the decisions of this Court in *Overnight Motor Transp. Co.* v. *Missel,* 316 U.S. 572 (1941) and *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697 (1944), and the failure to follow these cases has resulted in an unconscionable judgment against petitioner which this Court in the interest of justice ought to correct. Nowhere in his Brief in Opposition does respondent answer these arguments. At no place does respondent contend that the controlling Supreme Court decisions were followed or that the judgment below is correct. His silence fortifies the conclusion that this case is one where the Court should grant the writ of certiorari to bring the judgment below in line with its prior decisions and correct the serious injustice which has been done.

II. SUMMARY REVERSAL AND REMAND IS PROPER

Under the circumstances, summary reversal is proper upon granting the writ of certiorari in this case. Respondent's argument to the contrary (Resp. Br., pp. 8-11) is without foundation. (The succeeding paragraphs have been numbered to correspond to Respondent's alternative argument.)

First. The stipulation at the trial (R. 141) only settled that respondent's "actual working time" was

thirty hours. Obviously, it did not settle the number of hours for which he was employed, because if it had, there would have been no reason to continue the trial. Such a stipulation would have concluded the issue and there would have been no reason for the trial judge to determine the matter.

Second. The contractual provision referred to is the Eight Hour Day standard contract clause. It was not invoked by respondent in his complaint (R. 4), nor could it have been since by its terms it is applicable only to laborers and mechanics and not to watchmen. *Gordon* v. *U. S.*, 31 Ct. Cl. 254 (1896), 26 Ops. Atty. Gen. 622 (1908), *id* 604. Finally, the only rights conferred by the provision are for the United States.

Third. There is no inconsistency between the petition for a writ of certiorari and the position of petitioner below. Petitioner argued that respondent was not entitled to any additional compensation for the time he spent sleeping on petitioner's premises. Petitioner is not challenging the decision of the Supreme Court of Louisiana in this regard. Petitioner is only challenging the amount the courts below have held respondent should recover, because this amount is computed in a manner clearly contrary to the prior decisions of the Supreme Court of the United States.

Fourth. In seeking summary reversal, petitioner is not asking this Court to determine the amount of respondent's recovery, nor is petitioner seeking to foreclose any arguments repondent may wish to advance in that regard. Petitioner is merely asking for summary reversal and "remand with instructions to recompute the judgment in conformity with the decisions of this Court." (Pet. p. 7) Since the judgment below is clearly contrary to the controlling decisions of

this Court (which respondent apparently concedes), summary reversal is proper.

Fifth. It is significant that respondent does not challenge petitioner's assertion that the stipulation is the product of mistake which resulted in an unconscionable penalty. Indeed, the respondent tacitly concedes this error, his only explanation or comment being "The record is totally devoid of information showing how the computation was made". It is elementary that any agreement including a stipulation of the kind in the case at bar is void if based on mutual mistake.

III. CONCLUSION

For the foregoing reasons and those contained in the Petition for Writ of Certiorari, the writ should issue and the cause should be remanded with instructions to recompute the judgment in conformity with the decisions of this Court.

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April 26, 1956.